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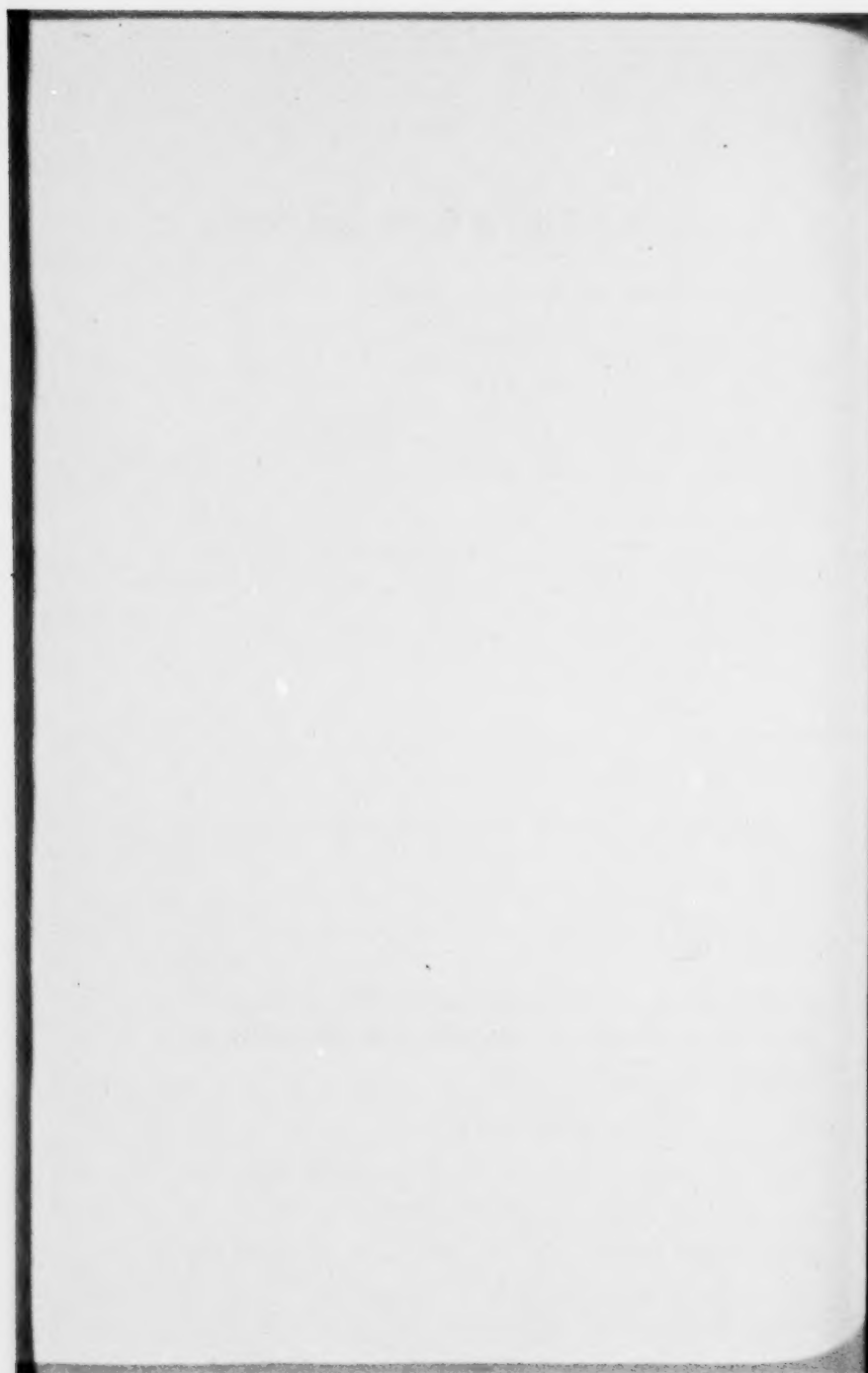
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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1126

GOLDBLATT BROTHERS, INC., A CORPORATION,
PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE
WAGE AND HOUR DIVISION, UNITED STATES
DEPARTMENT OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 268-278) is reported in 56 F. Supp. 255. The opinion of the Circuit Court of Appeals (R. 305-310) is reported in 152 F. 2d 475.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 29, 1945 (R. 311). A petition for rehearing was denied on January 25,

1946 (R. 312). The petition for certiorari was filed on April 17, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether employees employed in the central offices and in a drapery shop of a chain store system, which is engaged in distributing merchandise from out-of-State sources to several stores located in two States and in producing goods for delivery to such stores, are "engaged in a retail * * * establishment" within the exemption provided by Section 13 (a) (2) of the Fair Labor Standards Act because located in the same building as the State Street retail store or warehouse.

2. Whether all employees employed in the warehouses, central offices, bakery, and drapery shop of such a chain store system are engaged in a "local retailing capacity" within Section 13 (a) (1) of the Act as that term has been defined and delimited by the Administrator.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act and of the regulations of the Administrator are set forth in the Appendix to the Petition (p. 23).

STATEMENT

Petitioner, an Illinois corporation, owns and operates a large chain department store enter-

prise consisting of 14 department stores, one drug store, six warehouses, and a bakery (Finding of Fact II, R. 278). Eight of the department stores and the drug store are located in Chicago (R. 278). One store is located in Joliet, Illinois, one in Hammond, Indiana, and one in Gary, Indiana (*ibid.*)¹. Servicing these retail outlets are six warehouses, located in various sections of Chicago (R. 279), which receive a large proportion of merchandise from out-of-State sources (Pet. 5), and distribute it regularly to the Indiana and Illinois stores. All, except the State Street warehouse,² are geographically and physically separate from the department stores. All of the warehouses distribute goods to the retail stores in both Illinois and Indiana. Merchandise is received daily at the warehouses by rail or truck (R. 69-73), and shipped daily by truck from the warehouses to the department stores and customers in Illinois and Indiana (R. 87-89, 129-130). No selling is done at any of the warehouses, although some merchandise sold at the retail stores from samples, such as furniture, is sometimes delivered directly from a warehouse.

¹ The other three department stores, which are operated by petitioner as part of a different chain, are located in South Bend, Indiana, Milwaukee, Wisconsin, and Buffalo, New York.

² The State Street warehouse occupies its own two buildings but is connected with the store building by two overhead and one underground passageways (R. 279, 282).

Petitioner maintains central offices, which, although located in the same building as the State Street store, perform functions for all of the stores. They are operated as a separate service unit of the entire system. The ninth and tenth floors of the State Street store are used primarily for these central offices, which include the executive offices, merchandising office, traffic, personnel, legal, banking, pay roll, and accounting departments, and the buying offices for the stores both within and without the State of Illinois. (R. 41-42, 75, 283.)³ The general public is not admitted to the ninth and tenth floors, no sales are made on these floors, and no merchandise is displayed there (R. 75). The first eight floors of the building are used for retail selling, and the elevators used by the customers do not run above the eighth floor. Separate elevators for employees of the executive offices run directly to the ninth floor. (R. 173.)

Most of the employees in the central offices are engaged in activities relating to the purchase of goods, maintenance of records, and payment of bills for petitioner's entire chain system (R. 39-42). These offices are in constant communication with all of the stores and the warehouses

³ These offices were formerly in one of petitioner's warehouses and were moved to the ninth and tenth floors of the State Street store in December 1942, when the warehouse in which they were located was appropriated by the Secretary of War (R. 69).

(R. 42). The duties of employees in the central offices include the handling of purchase orders, the payment of the bills for all the stores (R. 40), the keeping of records of all goods purchased, received, and paid for, the advertising, accounting and sales promotion work for the stores in Illinois and Indiana, the keeping of records of employees of all stores, the payment of wages and salaries for all of petitioner's employees located within and without Illinois, and the handling of bank deposits for all the stores, including the South Bend, Milwaukee and Buffalo stores (R. 39-42, 175).

On the tenth floor of the building is also located the advertising department which handles all of the advertising, including the artwork and engraving for advertisements for all the stores (R. 52). Employees in this department prepare advertising circulars every week which are distributed by mail or delivered by petitioner's employees to newspapers or contract distributors in Illinois and Indiana for publication in the newspapers of both States (R. 52, 76).

In addition to the purchasing, receiving, and distributing functions performed at the warehouses, manufacturing operations also are carried on in two of them. At the 14th Street warehouse petitioner operates a comforter work shop for the making of quilts and comforters for its retail stores. In the State Street warehouse petitioner manufactures drapes. In the fiscal year ending

January 31, 1943, approximately \$187,000 worth of draperies were produced, approximately 15 percent of which were manufactured for the Hammond and Gary, Indiana stores. (R. 282.) Petitioner also operates a bakery, located on Lexington Street in Chicago, which produced approximately \$520,000 worth of goods for the fiscal year ending January 31, 1943, approximately 17 percent of which were sent to the Indiana stores (R. 279).

Petitioner originally urged that all of its employees, including the employees in the warehouses, bakery and central offices were exempted from the provisions of the Act on the grounds that they were employed in "a retail establishment" and that they were employed in a "local retailing capacity." On appeal to the Circuit Court of Appeals, subsequent to this Court's decision in *Phillips Co. v. Walling*, ³²⁴ U. S. 490, petitioner abandoned its reliance on the retail establishment exemption except with respect to its drapery shop and central office employees. Exemption for all of its employees was still claimed, however, on the ground that they were engaged in a "local retailing capacity."

The Administrator has conceded that some of petitioner's employees who work out of the warehouses installing and servicing electrical equipment, gas heaters, furniture and radios in the homes of retail customers in connection with retail sales are employed in a "local retailing capacity" and, accordingly, exempt under Section 13

(a) (1) of the Act (R. 162). It has also been conceded that employees engaged in making retail sales at the bakery (R. 258) are employed in a "retail establishment" and, thus, exempt under the provisions of Section 13 (a) (2) of the Act. The decision below did not deal with these employees.

The court below, relying upon this Court's decision in *Phillips Co. v. Walling, supra*, held that the employees in five of the six warehouses,⁴ the drapery shop employees in the State Street warehouse, and the bakery and central office employees "are engaged in wholesaling and manufacturing functions which are neither retail nor local, and that * * * the exception under Section 13 (a) (1) or 13 (a) (2) is inoperative" (R. 310).

ARGUMENT

I

Petitioner no longer questions the applicability of the Section 13 (a) (2) exemption to employees in the segregated warehouses, but urges that its

⁴ The district court found that the State Street warehouse is "almost entirely devoted to activities connected with the State Street store" (R. 282) which it adjoins and with which it is connected by overhead and underground passageways. Inasmuch as the Administrator has not taken a position with respect to the application of the 13 (a) (2) exemption to a warehouse serving a single retail store, it was not claimed in the court below that this exemption is inapplicable to employees in this warehouse other than those who worked in the drapery shop.

central office employees and its drapery shop employees are within the scope of the exemption because they work in the same buildings which house the State Street store and warehouse. The holding and rationale of this Court in *Phillips Co. v. Walling*, 324 U. S. 490, adequately dispose of petitioner's contention.

The opinion in the *Phillips* case recognizes that the "central office employees are performing wholesale duties in the very midst of the stream of interstate commerce * * * completely unlike those pursued by employees of the small local retailers" (324 U. S. at 497-498). Virtually identical duties are performed by the central office employees here. The only basis of distinction relied on by petitioner is that the central office employees involved here performed their wholesale duties in the building which also housed the State Street store. We do not believe the central office's location in the State Street building is a significant or controlling factor.

The central office is an establishment separate from the store. It is physically separated from the store in that it is located on separate floors not used for retail selling. It is serviced by separate elevators, not used in the operation of the retail store, which run directly to the floors on which the offices are located (see *supra*, p. 4). It is operated as an office separate and apart from any one of the retail stores. Its location in the same building as one of the retail stores is acci-

dental and not functionally significant, as is evident from the fact that it was previously located in one of the warehouses and was moved only because the Government appropriated the warehouse (see *supra*, p. 4n). Obviously, a single building may be occupied by both retail and non-retail establishments. A common example is the office or loft building with typical retail establishments occupying the street floor. Thus, the Administrator has long recognized that retail functions, which are carried on in a physically separated place from (albeit in the same building as) other non-retail functions of the same employer, may, nevertheless, qualify for the retail establishment exemption.⁸ Under this construction of the exemption, if the central offices are sufficiently segregated, the retail establishment exemption is applicable to the store but not to the offices.

Petitioner's contention is not advanced by refusing to view the central office as separate from the retail establishment. If viewed as a single establishment neither the store nor the office employees would be within the exemption. Under the reasoning of this Court in the *Phillips* case, if the entire building must be taken as a single establishment, "the combined retail-wholesale nature of petitioner's interstate business would prevent it

⁸ See Interpretative Bulletin No. 6, United States Department of Labor, Wage and Hour Division, December 1938, revised June 1941, par. 41 (1942 Wage Hour Man. 326, 337).

from properly being classified as a local 'retail establishment' " (324 U. S. at 496).

By a parity of reasoning, the drapery shop employees in the State Street warehouse building are not within the exemption even if the warehouse be regarded as part of the retail establishment. Clearly, the manufacture of draperies for the Indiana as well as the Illinois stores, considered separately, is not a retail function. See *Roland Electrical Co. v. Walling*, No. 45, this Term; *Davis v. Goodman Lumber Co.*, 133 F. 2d 52 (C. C. A. 4). And if not considered separately, the combination of retail and non-retail functions, under the reasoning of the *Phillips* case, would make the retail establishment exemption entirely inapplicable.

The court below was, therefore, clearly correct in holding Section 13 (a) (2) inapplicable to petitioner's central office and drapery shop.

II

Petitioner also contends that all of its employees, including those in the segregated warehouses, the bakery, the drapery shop and the central offices, are employed in a local retailing capacity and therefore exempt under the terms of Section 13 (a) (1). Although, as petitioner suggests, the scope of Section 13 (a) (1) has not been passed upon by this Court, the question which is determinative of the issue here was decided adversely to petitioner in the *Phillips*

case. If the functions performed in the warehouse and the central offices are all retail functions, as urged by petitioner, it would seem to follow that the establishment in which they are performed is a retail establishment. But this Court held the contrary in the *Phillips* case.

Petitioner (Pet., p. 13), relies on the Administrator's definition of the term "local retailing capacity," which includes "work immediately incidental" to "making retail sales." But this does not comprehend manufacturing and wholesaling functions. Clearly, no such sweeping exemption, which would have been inconsistent both with the position uniformly taken by the Administrator in the courts and with the *Phillips* decision, was intended by the Administrator. The narrow scope of "work immediately incidental" to retail selling is plainly indicated by the illustrative phrase in the definition "such as wrapping or delivery of packages."^{*} The language of the Administrator's regulation as well as the established principle that

^{*} Examples of the work recognized by the Administrator as "immediately incidental" to the making of retail sales are: demonstration work by a manufacturer's agent where the demonstration is designed to and actually does customarily and regularly result in retail sales (1942 Wage Hour Man. 357); the entry of particular retail sales or billing of particular retail customers, in connection with retail sales (1943 Wage Hour Man. 267); or the sorting of packages at depots of an employer operating a parcel delivery service for retail stores. The Administrator's interpretations of his own regulations are of controlling weight. *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410

the exemptions from this remedial statute should be narrowly construed (see *Phillips* decision, 324 U. S. at 493), confirm the view of the court below.

CONCLUSION

This case raises no problem not covered by this Court's reasoning in *Phillips v. Walling*, and the court below correctly so held. The petition for certiorari should be denied.

Respectfully submitted.

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